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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, *et al.*,
Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES RICHARD A. GEPHARDT, DANNY K. DAVIS, JUANITA MILLENDER-McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE M. SLAUGHTER, and BENNIE G. THOMPSON SUPPORTING APPELLANTS

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Representatives Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, and Bennie G. Thompson, intervenors in the

district court,[1] having already submitted an extensive merits brief in No. 98-404, *United States Department of Commerce v. United States House of Representatives*, submit this short additional brief to address the distinctive aspects of the Virginia district court's opinion in this case. As we show, this new opinion adds little to the failed arguments offered by the D.C. district court in support of the proposition that Congress has prohibited use of statistical techniques designed to enhance the accuracy of the decennial census.

STATEMENT

On September 24, 1998, the U.S. District Court for the Eastern District of Virginia joined the U.S. District Court for the District of Columbia in ruling that 13 U.S.C. § 195 bars the Census Bureau from using any form of "sampling" to adjust the results of the decennial census to make it more accurate -- at least to the extent that the results are then used for purposes of apportionment of seats in Congress among the states. The Virginia court's opinion, however, includes just a handful of pages discussing the merits. In that short section, the court pointed to no affirmative indication that Congress -- in enacting section 195 in 1957 or amending it in 1976 -- ever sought to prevent use of statistical methods to address the persistent problem of the undercount. Nor did the court attempt to square

[1]In the joint motion of appellants and appellees Glavin *et al.* seeking to consolidate this case with No. 98-404 and requesting an expedited briefing schedule, some question was raised about whether those groups who filed motions to intervene in the Virginia district court were ever granted party status. Any doubt on that score has now been allayed by an order entered on October 15, 1998, by the Virginia court clarifying the fact that it intended to grant the intervention motions on August 7 when it allowed counsel for the intervenors to appear and argue the case on the merits.

its ruling with the acknowledged fact that the Census Bureau has for decades used forms of statistical sampling in producing counts used for apportionment -- including "imputation" and the "postal vacancy check." *See* J.S. App. 3a-4a (describing use of imputation in the 1990 Census); *id.* at 3a (asserting, without explanation, that the "Bureau's plan to use sampling in the Postal Vacancy Check is not in dispute in this lawsuit").

Instead, the court purported to rely solely on the "plain language and structure of the Act." J.S. App. 21a. As we discuss here, however, the plain language of the statute simply does not point to the conclusion that sampling is barred for purposes of apportionment. That is why the D.C. district court went to great lengths to deploy various presumptions and supposed principles of statutory interpretation in an unpersuasive effort to justify rejection of the obvious harmonizing reading of the two relevant statutory provisions, 13 U.S.C. §§ 141(a) and 195. The Virginia court's solution -- to rely on flat assertions about "plain meaning" that lack any valid basis in the actual meaning of the words Congress used -- is even less persuasive.

SUMMARY OF ARGUMENT

The Virginia court's reading of the "plain language" of the statute was flawed in multiple ways. First, it suggested that section 141 would not, on its own, authorize use of sampling for purposes of apportionment. But there can be no doubt that section 141(a) is fairly read as authorizing such a use of sampling, as even the D.C. court acknowledged. Second, the Virginia court read the "except" clause of section 195 as a flat prohibition of use of sampling for apportionment purposes. But that is wrong as well. The court was obligated to try to harmonize sections 141(a) and 195, and that is easily

accomplished if the "except" clause of section 195 is read in accordance with what it says -- not as a prohibition but simply as an exception from the *mandated* use of sampling for *non*-apportionment purposes.

Such a reading is entirely fair. An exception to a mandate, like that contained in section 195, is not ordinarily understood to create a prohibition of anything. Indeed, this reality is illustrated by the two cases cited by the district court -- *Richardson v. Ramirez*, 418 U.S. 24 (1974), and *Crosby v. United States*, 506 U.S. 255 (1993) -- both of which involved "except" clauses that *themselves* prohibit nothing. Finally, the district court's reliance on the principle that a court should, where possible, read a statute so as to give each relevant provision some separate significance, was remarkable. It is the court's own proposed reading that renders the reference to sampling in section 141(a) utterly superfluous.

ARGUMENT

The reasoning offered by the Virginia district court to support its decision to enjoin the Census Bureau from using statistical sampling for apportionment purposes in the 2000 Census is even less persuasive than that contained in the earlier ruling of the D.C. district court. Like the D.C. court, the Virginia court held that section 195 of the Census Act, 13 U.S.C. § 195, precludes the Census Bureau from using sampling for that purpose and thus trumps the apparent authorization of sampling in the decennial census for all purposes contained in section 141(a) of the Act, 13 U.S.C. § 141(a). In so doing, the Virginia court, like the D.C. court, avoided the obvious possibility of applying both sections harmoniously -- *i.e.*, interpreting section 141(a) as authorizing sampling for all purposes and section 195 as requiring

sampling, wherever feasible, outside the apportionment context. But as explained in our earlier brief in No. 98-404, the law plainly requires a court to explore and adopt such a harmonizing reading, rather than assume that Congress (1) decided to create an exception to an ostensibly universally applicable provision and then (2) did so, not by including an exception in that section, but by enacting a separate section that makes no reference to the first. *See* Br. of Intervenors Gephardt *et al.* at 16-23, in No. 98-404.

The district court began its statutory analysis by suggesting that section 141(a), read by itself, does not authorize the use of sampling for apportionment. That section expressly authorizes the Secretary to use "sampling procedures" in the "decennial census of population" -- the primary (and sole constitutional) purpose of which is collection of population information for use in apportionment of seats in Congress among the states. But the district court, although acknowledging that "Section 141 of the Census Act generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition," J.S. App. at 18a, pointed to section 141(g), which defines a "census of population" as a "census of a population, housing, and matters related to population and housing." Based on this slim reed, the court drew the remarkable conclusion that "the plain language of Section 141 itself . . . establishes . . . Congress' intent . . . to authorize sampling for numerous purposes of the census *other than congressional apportionment*." *Id.* (emphasis added).

That reading is utterly indefensible. To the contrary, section 141(g) makes clear that the authorization of sampling in section 141(a) extends to the census of *population*, the very census routinely used for apportionment. Indeed, section 141(b) states that the tabulation of population used for

apportionment is to be based on the decennial census authorized by section 141(a). That is why even the D.C. district court concluded that section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. at 61a, in No. 98-404.

The Virginia court then went on to place greater reliance on the assertion that "[u]nder 13 U.S.C. § 195, Congress' prohibition against the use of sampling is clear on its face." J.S. App. 18a. It then asserted that section 195 is more "specific" and, relying on various decisions of this Court, concluded that this more specific provision must be read to trump the authorization of sampling for apportionment purposes in section 141(a). But for reasons already discussed in our prior brief, this analysis was severely flawed.

First, as the Virginia court itself recognized, the principle that a specific provision controls a more general provision takes effect *only* when the two provisions cannot be "reconciled." J.S. App. 20a; *see* Br. of Intervenors Gephardt *et al.* at 17-18, in No. 98-404 (citing cases). Second, it is hardly "clear on its face" that the "except" clause in section 195 constitutes a *prohibition* of anything. To the contrary, as the D.C. court acknowledged, an exception to a mandate does not always -- or even ordinarily -- create a prohibition. *See id.* at 20-22. There is thus no reason to avoid the obvious harmonizing reading of sections 141 and 195 as (1) authorizing use of sampling for apportionment purposes while (2) requiring such use, wherever feasible, for other purposes.

The district court offered only two arguments to support its rejection of that reading. First, it cited two cases involving provisions with "except" clauses. Neither, however, is remotely apposite because neither interprets an except/shall

sentence structure as itself creating a prohibition. Indeed, these cases provide further support for the proposition that when Congress uses the except/shall structure, it does not ordinarily -- if ever -- intend to create a prohibition. At most it intends to allow other sources of law to govern the area that it has exempted, and these other sources of law determine whether or not there is a prohibition. Here, the relevant other source of law is Section 141 which, rather than prohibiting the use of sampling for apportionment, expressly authorizes the Census Bureau to do so.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the first case cited by the district court, this Court considered an equal protection challenge to a state's disenfranchisement of a class of convicted criminals. In rejecting that challenge, the Court relied on Section 2 of the Fourteenth Amendment which imposes sanctions on states (a diminution of representation) if they disenfranchise their citizens but exempts from that sanction states that disenfranchise criminals or rebels:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . But when the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .

U.S. Const., amend. XIV, § 2. The Court concluded that the Amendment would not have exempted states that disenfranchise criminals from its automatic sanction of diminished representation if another portion of the same Amendment -- the equal protection clause -- simultaneously

forbade states altogether from disenfranchising criminals. 418 U.S. at 55.

Contrary to the unexplained suggestion of the district court, nothing in *Richardson v. Ramirez* in any way supports that court's reading of section 195. The "except" clause in the Fourteenth Amendment is an exception from imposition on states of a penalty for abridging their citizens' right to vote. The Court never suggested that this clause itself creates any sort of mandate or prohibition. It may well be that the Fourteenth Amendment does prohibit Congress from reducing the representation of states that disenfranchise criminals, but this prohibition is created by the first sentence of Section 2, which provides that apportionment is to be based on states' respective numbers, not by the except clause in the second sentence. The except clause merely establishes that states which disenfranchise criminals are not subject to the automatic sanction of diminished representation and thus that apportionment for those states continues to be governed by the first sentence of Section 2. The analogous provision of the Census Act is Section 141, which, rather than prohibiting the Census Bureau from using sampling, explicitly allows it to do so.

Like the Fourteenth Amendment, the underlying statute at issue in *Crosby v. United States*, 506 U.S. 255 (1993), also cited by the district court, shows that when Congress exempts an area from a mandate, it does not ordinarily intend to create a prohibition. In *Crosby*, this Court was interpreting Rule 43(a) of the Federal Rules of Criminal Procedure, which requires that criminal defendants be present at trial, "except as otherwise provided." The Court concluded that the "except" clause was exclusive; it leaves no room for creation of exceptions not "otherwise provided." But the Court never intimated that the

"except" clause, where it applies, *prohibits* a defendant's presence at trial.

Nor could it have done so. For example, one of the exceptions "otherwise provided" is Rule 43(c)(2), which states that a defendant may choose not to attend a trial of a crime punishable by less than one year's imprisonment. But the defendant obviously retains the *option* to attend. Thus, the fact that this situation is excepted from the requirement in Rule 43(a) merely preserves discretion. Here, once again, an exception from a mandate is just that, and nothing more.

Finally, the district court relied on the principle that a statutory interpretation should, where possible, give effect to every statutory provision. J.S. App. 19a-20a. But that principle, in fact, strongly undercuts the court's preferred interpretation. The district court's argument was that defendants' reading of the statute "renders the 'except for' language [in section 195] devoid of meaning." J.S. App. 19a. But that is clearly incorrect. The "except" clause in section 195 exempts sampling for purposes of apportionment from the conditional *mandate* established in the rest of section 195. By exempting apportionment from this requirement, Congress left the Census Bureau discretion to refrain from using sampling for apportionment even if it is feasible.

Indeed, it is the district court's reading that violates the canon that a statute should, if possible, be construed so that every word has substantive effect. Under that reading, section 141(a)'s authorization of sampling is entirely superfluous, because section 195 controls the use of sampling both inside and outside the context of apportionment. Only under defendant's reading does section 141(a) have independent force

-- providing the Census Bureau with affirmative authorization to use sampling for apportionment purposes.

In sum, nothing in the Virginia district court's opinion in any way strengthens the arguments in favor of reading the Census Act as prohibiting use of sampling for apportionment purposes. For all of the reasons stated here and in our earlier brief, the Act is best read as allowing the Census Bureau to make that choice.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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